

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

NICHOLAS J. MANN,

Debtor.

CASE NUMBER 02-45248

SANDRA MULLEN,

Plaintiff,

vs.

ADVERSARY NUMBER 03-4089

NICHOLAS J. MANN,

Defendant.

M E M O R A N D U M O P I N I O N

This matter came before the Court on the cross motions of the parties for summary judgment. Plaintiff Sandra Mullen ("Plaintiff") filed a motion for summary judgment ("Plaintiff's Summary Judgment Motion"), to which Debtor/Defendant Nicholas J. Mann ("Defendant") filed a memorandum in opposition ("Defendant's Response"). Several months later, Defendant filed a motion for summary judgment ("Defendant's Summary Judgment Motion"). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

F A C T S

Plaintiff, a creditor of Defendant, filed an adversary proceeding to determine the dischargeability of a debt in the amount of Seventy-Seven Thousand Eight Hundred Sixty-Nine and 24/100 Dollars (\$77,869.24) (the "Complaint"). Plaintiff asserts that the debt is nondischargeable because it was obtained by false pretenses, false representations and actual fraud. Defendant used a fraudulent power of attorney to convert property to his own use that was owned by Charles H. Bolyard, now deceased. Defendant filed an answer ("Answer") to the Complaint, which generally denies the substantive allegations and asserts several affirmative defenses. Plaintiff's and Defendant's Summary Judgment Motions followed.

S U M M A R Y J U D G M E N T S T A N D A R D

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp.*

v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476

(6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

D I S C U S S I O N

Bankruptcy Code § 523(a)(2)(A) provides that any debt for money or property that was obtained by false pretenses or a false representation will not be discharged. A debtor will not be discharged "from any debt . . . for money, [or] property . . . to the extent obtained by false pretenses, a false representation, or actual fraud" 11 U.S.C. § 523(a)(2)(A). In the case at bar, Plaintiff established that a prior court order found Defendant "guilty of concealing" assets and awarded the Estate of Charles H. Bolyard, through Plaintiff, money damages. (Pl.'s Summ. J. Mot., Ex. A at 3; Def.'s Resp., Ex. C at 3; Def.'s Summ. J. Mot., Ex. C at 3.) Accordingly, summary judgment in favor of Plaintiff is appropriate, and the related money damages are nondischargeable.

The Court of Common Pleas, Division of Probate, Trumbull County, Ohio, found Defendant "guilty of concealing and having been in possession of assets of the trust estate," (the "Judgment Entry"). (Pl.'s Summ. J. Mot., Ex. A at 3; Def.'s Resp., Ex. C at 3; Def.'s Summ. J. Mot., Ex. C at 3.) The Judgment Entry indicates that Defendant signed Charles H. Bolyard's name as principal on the power of attorney without the knowledge or consent

of Charales H. Bolyard, and transferred over One Hundred Thousand Dollars (\$100,000.00) worth of property to himself and others. The Judgment Entry ordered Defendant to pay Seventy Thousand Seven Hundred Ninety and 24/100 Dollars (\$70,790.24) and to return certain specified items of personal property or the value thereof to the "Estate of Charles H. Bolyard, Deceased." (Pl.'s Summ. J. Mot., Ex. A at 3; Def.'s Resp., Ex. C at 3; Def.'s Summ. J. Mot., Ex. C at 3.) In addition, the Judgment Entry ordered Defendant to pay a statutory ten percent (10%) penalty on the amount of One Hundred Five Thousand Seven Hundred Forty and 24/100 Dollars (\$105,740.24), bringing the total amount to Eighty-One Thousand Three Hundred Sixty-Four and 26/100 Dollars (\$81,364.26).¹

Defendant argues that summary judgment in favor of Plaintiff is not warranted because the Probate Court failed to make any finding that Defendant committed a fraudulent, willful, intentional or wrongful act. However, Defendant gives too little weight to the Probate Court's finding that "Nicholas J. Mann, Jr. [is] guilty of concealing and having been in possession of assets of the trust estate." (Pl.'s Summ. J. Mot., Ex. A at 3; Def.'s Resp., Ex. C at 3; Def.'s Summ. J. Mot., Ex. C at 3.) The use of the phrase "guilty of concealing" connotes a wrongful and intentional act to defraud. *In re Estate of Popp*, 94 Ohio App. 3d

¹The Complaint inaccurately calculated the total to be Seventy-Seven Thousand Eight Hundred Sixty-Nine and 24/100 Dollars (\$77,869.24). Since the Court's holding is based on the amount ordered in the Judgment Entry, the Court will not use the amount sought in the Complaint, but rather the amount granted by the Probate Court.

640 (1994), provides that proceedings under O.R.C. § 2109.50 are quasi-criminal in nature. Although the Probate Court was not required to and did not make a specific finding of scienter or criminal intent by Defendant, there is enough in the Judgment Entry to warrant an interpretation that Defendant's concealment and possession of the estate's assets was wrongful and done under false pretenses. Accordingly, summary judgment in favor of Plaintiff is appropriate and the Judgment Entry award is nondischargeable under § 523(a)(2)(A).

Defendant argues that this Court should not rely upon the Judgment Entry because it was based on a "special, limited summary proceeding," which "severely restricted Defendant's ability to prepare and defend." (Def.'s Response; Def.'s Summ. J. Mot.) Nowhere in the Judgment Entry is there a reference to any special, limited summary proceeding or that it is based on O.R.C. § 2109.50. Indeed, the Judgment Entry is based on the "evidence presented" and the Court notes that there was a hearing at which both sides were present and represented. In any event, O.R.C. § 2109.50 permits the kind of special proceeding about which Defendant now complains. Defendant did not appeal the Judgment Entry and since it is a final order, no longer subject to appeal, there does not appear to be any valid reason not to rely on the Judgment Entry as an enforceable judgment.

Defendant contends that he is entitled to summary judgment because Plaintiff is not an interested party and therefore,

Plaintiff cannot bring an action in bankruptcy court. Defendant argues that FED. R. BANKR. P. 7017 and FED. R. CIV. P. 17 require that an action be brought by the "real party in interest." Defendant argues that Plaintiff is not the real party in interest because the Judgment Entry was granted in favor of the Estate of Charles H. Bolyard, not Plaintiff. However, Rule 7017 further states that "[a]n . . . administrator . . . may sue in that person's own name without joining the party for whose benefit the action is brought[.]" FED. R. BANKR. P. 7017. Plaintiff is a co-administratrix of the estate and she was a plaintiff in the lawsuit in which the Judgment Entry was entered and is therefore, a party in interest. Defendant also argues that O.R.C. § 2113.25 does not contain any authority for Plaintiff to bring an adversary proceeding, but this Code section merely deals with the time period for an administrator to collect assets. Accordingly, this Court finds that Plaintiff has standing to bring the adversary proceeding before the Court.

Upon the undisputed facts, Plaintiff has established the necessary elements of Bankruptcy Code § 523(a)(2)(A) and is entitled to summary judgment. Accordingly, the judgment that is encompassed in the Judgment Entry dated November 19, 1999 entered by the Trumbull County Probate Court is not discharged.

C O N C L U S I O N

Plaintiff's Summary Judgment Motion is granted and Defendant's Summary Judgment Motion is denied.

An appropriate order shall enter.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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Debtor.

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O R D E R

For the reasons set forth in this Court's memorandum opinion entered this date, Plaintiff's Summary Judgment Motion is granted and Defendant's Summary Judgment Motion is denied. The Judgment Entry award in the amount of Eighty-One Thousand Three Hundred Sixty-Four and 26/100 Dollars (\$81,364.26) is nondischargeable under 11 U.S.C. § 523(a)(2)(A).

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this _____ day of September, 2004, addressed to:

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